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"LAST CLEAR CHANCE" IN VIRGINIA—INJURIES BY RAILROADS.*

It is everywhere agreed that as a general rule negligence is a ground for recovery and that contributory negligence bars a recovery. The defense of contributory negligence has been modified in some cases by statute. The federal Employers' Liability Act has substituted comparative negligence for contributory negligence, and abolished the defense where the violation of a statute for the protection of employees contributed to the injury, in the case of interstate carriers. (See 1 Va. Law Reg., N. S., p. 893.) Acts 1916, p. 762, contains the same provisions as to intrastate steam carriers in Virginia, (see 2 Va. Law Reg., N. S., p. 560,) while Acts 1916, p. 506, requires contributory negligence relied upon as a defense to be set forth by bill of particulars upon motion. Nor has the defense of contributory negligence been favored by the courts. It is in the exceptions to the rule that contributory negligence defeats a recovery that the courts have divided, and the decisions have brought forth, among others, the doctrines of imputable negligence, attractive nuisances or Turntable Cases (see Editorial in this issue); and last clear chance.

The doctrine of last clear chance, discovered peril, or the humanitarian rule, as it is variously called, is the most important of these. The principle was first announced in the famous "donkey case" (Davies *v.* Mann, 10 Mees. & Wels. 546; 19 Eng. Rul. Cas. 190) sometimes called the "donkey doctrine" by those who disapprove of it. However, it is firmly intrenched in England and in the great majority of the American states. It is very frequently applied in cases of personal injuries received from railroads. While the doctrine is generally admitted, its

*For general discussion of this subject see 2 Va. Law Reg., N. S., p. 7.

application to a particular set of facts is often complicated because of various subordinate principles. The rule is clearly stated in Norfolk So. R. Co. *v.* Crocker, 117 Va. 327, 331, 84 S. E. 681, quoted in the opinion in Kabler *v.* Southern R. Co. (Va.), 92 S. E. 815, 817, as follows: "The rule * * * is a qualification of the general rule that contributory negligence bars a recovery, and the principle is that, although the plaintiff has been negligent in exposing himself to peril, and although his negligence may have continued until the accident happened, he may nevertheless recover if the defendant, after knowing of his danger and having reason to suppose that he may not save himself, could have avoided the injury by the exercise of ordinary care, and failed to do so."

The element of notice to the defendant of the plaintiff's danger ("plaintiff's peril perceived") is of the essence of the doctrine. Thus in Chesapeake & O. R. Co. *v.* Saunders, 116 Va. 826, 83 S. E. 374, a recovery by the plaintiff was reversed, the court saying that there was nothing in the circumstances of the case to put those in charge of the train on notice of deceased's danger.

The plaintiff's peril need not, however, be actually known to the defendant; it is sufficient if it should have been known to or discovered by the defendant by the exercise of whatever degree of care he owed to the plaintiff. Thus in Chesapeake & O. R. Co. *v.* Rogers, 100 Va. 324, 334, 41 S. E. 732, where the plaintiff's intestate was killed while crossing a bridge used by the public as a walkway, to the knowledge of the railroad, it was held proper to instruct the jury that if by having a proper lookout the danger of plaintiff's intestate could have been discovered in time to avoid the accident, they must find for the plaintiff. And in Washington & O. D. Ry. *v.* Jackson, 117 Va. 636, 640, 85 S. E. 496, a recovery by the plaintiff was sustained where a boy lying on the track was run over by an electric car which could have been stopped in time to avert the injury if the motorman had kept a lookout continuously instead of giving only a passing glance to the boy and paying no further attention to him because he appeared at that distance to be an inanimate object.

There must be an appreciable interval after the plaintiff's

danger is discovered, or by the exercise of due care should have been discovered, in which there is a clear chance to avoid the accident. This is frequently expressed in the formula that where the negligence of both plaintiff and defendant is simultaneous and concurrent there can be no recovery. "Last clear chance" and "concurring negligence" are thus distinguished in Southern R. Co. *v.* Bailey, 110 Va. 833, 67 S. E. 365, 25 L. R. A. (N. S.), 379; and in Norfolk So. R. Co. *v.* Crocker, 117 Va. 327, 332, 84 S. E. 681. Thus in Real Estate Co. *v.* Gwyn, 113 Va. 337, 74 S. E. 208, a recovery by the plaintiff was reversed where an elevator boy partially opened the door and the deceased attempted to step off while the car was still moving downward and was struck by the descending top of the car almost instantaneously. So in Norfolk So. R. Co. *v.* White, 117 Va. 342, 84 S. E. 646, a recovery by the plaintiff was reversed where the plaintiff's intestate was walking along a path between two tracks and suddenly stepped upon the track in front of a moving engine, stumbled and fell. Likewise in Virginia & S. W. R. Co. *v.* Hill, 119 Va. 837, 89 S. E. 895, a recovery by the plaintiff was reversed where the plaintiff, a freight conductor, was negligently riding on a small step in front of an engine contrary to rules and on stepping off in front of the engine tripped and was immediately struck by it. So also in United States Spruce L. Co. *v.* Shumate, 118 Va. 471, 87 S. E. 723, a recovery by the plaintiff was reversed where the plaintiff drove upon a crossing where his view was obstructed by piles of lumber along the track and was not seen until he was upon the track and it was too late to stop the train. In Virginia & S. W. R. Co. *v.* Skinner, 119 Va. 843, 847, 89 S. E. 887, a recovery by the plaintiff was reversed where at a crossing with an unobstructed view for nine hundred feet along a straight track an automobile was driven upon the track within thirty feet of a rapidly approaching engine which could not have been stopped within that distance. And in Chesapeake Western Ry. *v.* Shiflett, 118 Va. 63, 70, 86 S. E. 860, it was held that the doctrine of last clear chance did not apply where "the mental and physical faculties of the other men would have had to act with more than human precision, and with the quickness of

electricity, to utilize the scant time and distance thus remaining * * *"

But if there is an appreciable interval of time in which the accident might be avoided it is ordinarily immaterial how short such space of time is. Thus in Norfolk So. R. Co. *v.* Crocker, 117 Va. 327, 84 S. E. 681, the plantiff stepped upon a track to examine a part of a car at the instance of the conductor, who then signalled an engine to couple up with the opposite end of the cars, which was done, and the plaintiff was knocked down and injured thereby. The engine was moving slowly and the conductor could have signalled it to stop or called to the plaintiff to move, but did neither. A recovery by the plaintiff was affirmed.

The doctrine of "error in extremis" is often applied to determine whether the plaintiff was guilty of contributory negligence. Where one is placed in a situation of danger by the negligence of another, he is not required in an emergency to exercise the same amount of skill or judgment demanded in ordinary circumstances. But the rule can not be invoked by a party who is not himself free from fault in creating the emergency. Real Estate Co. *v.* Gwyn, 113 Va. 337, 345, 74 S. E. 208; Virginia & S. W. R. Co. *v.* Hill, 119 Va. 837, 841, 89 S. E. 895. While the doctrine of "error in extremis" is usually invoked by an injured plaintiff, it has been conversely applied where a defendant has been confronted with an emergency caused by plaintiff's negligence. Norfolk & W. R. Co. *v.* Sink, 118 Va. 439, 453, 87 S. E. 740; Wise Terminal Co. *v.* McCormick, 104 Va. 400, 414, 51 S. E. 731.

In crossing accidents the plaintiff does not usually recover. Nothing is better settled than that it is contributory negligence per se to go upon a railway crossing without looking and listening. Boyd *v.* Southern R. Co., 115 Va. 11, 19, 78 S. E. 548, and cases cited. The traveler's duty to look and listen is continuous and must be performed in a way to make it effectual. United States Spruce L. Co. *v.* Shumate, 118 Va. 471, 480, 87 S. E. 723. And when the view is obstructed a greater degree of precaution is required. Atlantic Coast Line R. Co. *v.* Grubbs, 113 Va. 214, 74 S. E. 144. And an engineer or motorman need

not slacken speed but has the right to presume that one approaching a crossing will not go upon the track in front of a moving engine or car in plain view. Springs *v.* Virginia Ry. & P. Co., 117 Va. 826, 835, 86 S. E. 122. From the cases of crossing accidents cited above it is apparent that the space of time and distance after discovering the plaintiff's danger is usually too short to afford the defendant a clear chance of avoiding the accident. As the court said in Boyd *v.* Southern R. Co., 115 Va. 11, 19, 78 S. E. 548: "He was not in peril until he started to cross the track, and it was then too late for the engineer to have stopped his train or avoided injuring the plaintiff if he had been on the lookout and had seen the plaintiff's danger."

It has been repeatedly held in Virginia that a railway track is in itself a proclamation of danger. Boyd *v.* Southern R. Co., 115 Va. 11, 14, 78 S. E. 548, and cases cited. But in Atlantic Coast Line R. Co. *v.* Church (Va.), 92 S. E. 905, where plaintiff drove an automobile upon a crossing where the rails were so covered with earth as to be invisible along the highway and were rusty beyond and obstructed by vegetation growing close to the track, which was apparently abandoned, and in fact only one train a week was run over the line, and no crossing signal board was placed as required by Code 1904, § 1249d, subsec. 49, it was held that the plaintiff's contributory negligence was a question for the jury, and a verdict for him was affirmed. The doctrine of last clear chance was not there involved, since the jury found the plaintiff free from contributory negligence.

In Chesapeake & O. Ry. Co. *v.* Hunter (Va.), 91 S. E. 181, an automobile was stalled on a crossing over two thousand feet from an approaching "double-header" train which could have been and was stopped within twelve hundred feet after applying brakes. Plaintiff's intestate signalled the train to stop and it was admitted that the signal was seen and recognized. He then attempted to push the automobile off of the track and caught his foot in the guard rail. On evidence that the first engineer did not immediately on seeing the situation apply his brakes, and that the second engineer did not shut off steam within a reasonable time after he knew the air brakes had been applied, a recovery by the plaintiff was sustained.

The latest Virginia case on this point is Norfolk So. R. Co. *v.* Whitehead (Va.), 92 S. E. 916, in which a recovery by the plaintiff was sustained on evidence that his automobile was stopped on a crossing and that the defendant's motorman observed the situation while about one thousand feet distant and in ample time to have stopped the train before the collision by the use of ordinary care, but failed to do so.

The most difficult case, perhaps, is that of a person upon or near a railway track. Here the doctrine of last clear chance which, as stated at the outset, requires notice to the defendant of the plaintiff's peril is confronted with the well-established rule that an engineer has a right to presume that a person upon the track in the apparent possession of his faculties will get out of the way of an approaching train, or even more so that one near the track will not go upon it or near enough to it to be struck. Norfolk & W. R. Co. *v.* Dean, 107 Va. 505, 59 S. E. 389, and cases cited; Southern R. Co. *v.* Bailey, 110 Va. 833, 836, 67 S. E. 365; Norfolk So. R. Co. *v.* Crocker, 117 Va. 327, 332, 84 S. E. 681. In such case no peril is perceived because until it appears that the person on the track can not or will not save himself he is not considered to be in any danger. Savage *v.* Southern Ry. Co., 103 Va. 422, 49 S. E. 484; Norfolk & W. R. Co. *v.* Dean, 107 Va. 505, 59 S. E. 389.

Where the person is apparently not in possession of his faculties the doctrine of last clear chance is frequently applied, but it is not confined to these cases. Norfolk So. R. Co. *v.* Crocker, 117 Va. 327, 336, 84 S. E. 681. See also, Southern R. Co. *v.* Bailey, 110 Va. 833, 840, 67 S. E. 365; Seaboard R. Co. *v.* Joyner, 92 Va. 354, 23 S. E. 773. But the incapacity must be apparent to those in charge of the train. Thus in Tyler, Receiver, *v.* Sites, 88 Va. 470, 13 S. E. 978; S. C., 90 Va. 539, 19 S. E. 174, a recovery for the death of a deaf mute walking on the track was denied, there being no indication that he was not in full possession of his faculties.

The duty of an engineer seeing a person or indistinct object on the track is to keep his attention fixed upon the person as he approaches until it appears that the person is in danger and can not or will not remove himself in time, and then use due

diligence to avoid the accident. Railroads could not be run if an engineer was required to stop his train every time a person is seen upon the track. Despite the undoubted humanity of such a rule its practical application would be economically intolerable. So where a person on the track was not regarded as in danger by those operating a train until they got nearer to him and they then used due care to avoid injury to him, the company was held not liable in Norfolk & W. Ry. Co. *v.* Dean, 107 Va. 505, 59 S. E. 389. But where a motorman after one glance at a boy lying on the track thought it was an inanimate object and paid no further attention to it until too close to avoid the injury, the company was held liable in Washington & O. D. Ry. *v.* Jackson, 117 Va. 636, 640, 85 S. E. 496.

The test of liability in this class of cases is the presence of a "superadded fact or circumstance" putting those in charge of the train on notice that a person on the track is unconscious of his danger, or can not or will not save himself. This was clearly stated in Southern R. Co. *v.* Bailey; 110 Va. 833, 846, 67 S. E. 365. In Chesapeake & O. Ry. Co. *v.* Corbin, 110 Va. 700, 67 S. E. 179, the "superadded fact or circumstance" was that Corbin had a raised umbrella over his shoulder cutting off both view and hearing of the train. In Seaboard, etc., R. Co. *v.* Joyner, 92 Va. 354, 23 S. E. 773, the "superadded fact or circumstance" was that Joyner was sitting or lying down upon the track and the engineer was warned of this as he left a nearby station from which Joyner was plainly visible. In Southern R. Co. *v.* Baptist, 114 Va. 723, 77 S. E. 477, the "superadded fact or circumstance" which put the defendant on notice that the plaintiff would not step off the track was that the latter was struggling with an unmanageable horse. The decision was probably influenced by the fact that the plaintiff was attempting to rescue another from danger. The court quoted from a recent Minnesota case as follows: "Persons are held justified in assuming greater risks in the protection of human life than would be sustained under other circumstances. Sentiments of humanity applaud the act, the law commends it, and, if not extremely rash and reckless, awards the rescuer redress for injuries received, without weighing with technical precision the rules of

contributory negligence or assumption of risk." In Nortolk So. R. Co. *v.* Crocker, 117 Va. 327, 332, 84 S. E. 681, the court said: "The 'superadded fact or circumstance' in the present case, brought home to the knowledge of the conductor, as disclosed by the declaration, was that the plaintiff, who was on the track at the conductor's invitation and in his immediate presence, was engaged in examining the car which the conductor had called him to see."

In Kabler *v.* Southern Ry. Co. (Va.), 92 S. E. 815, 818, a judgment sustaining a demurrer to plaintiff's evidence was reversed because the jury "might have found the existence of sufficient superadded facts and circumstances" to put the engineer on guard that Kabler would not save himself. The "superadded facts or circumstances" were that Kabler, an old man, was walking slowly down the track against the wind, on a cold, blustering day, and leaning forward. The facts are very similar to those in Morton *v.* Southern Ry. Co., 112 Va. 398, 71 S. E. 561, analyzed in the opinion in the Kabler Case, except that the Morton Case was a crossing accident. The two cases are probably distinguishable only on the ground that while the jury might have found the existence of sufficient "superadded facts or circumstances" in each case, the Kabler case was decided on a demurrer to the evidence and merely sustained the right of the jury to pass on the question, while in the Morton Case the jury did not find the existence of such "superadded facts or circumstances," and, of course, the evidence thereof was not strong enough to reverse the jury's verdict.

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